Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES A. RIFENBURY,

Petitioner,

v.

DOUGLAS DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a habeas petitioner raises unreviewed ineffective assistance of counsel claims which would warrant the appointment of counsel under 18 U.S.C. §3006A in the interest of justice, whether retained counsel's confession that he was incompetent will relieve the petitioner of risk for his counsel's acts in not reading the habeas statute's statute of limitations provisions and filing his federal writ late?

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PETITION FOR A WRIT OF CERTIORARI

Charles Anthony Rifenbury respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit Court of Appeals denied Petitioner's request for a certificate of appealability on April 19, 2004, *Rifenbury v. Dretke,* No. 03-11130 (5th Cir. 2004). *See* Appendix at p. App. 1. The United States District Court for the Northern District of Texas, Fort Worth Division denied Petitioner's request for a certificate of appealability on October 28, 2003. *See* Appendix at p. App. 3.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Rifenbury's request for a Certificate of Appealability was entered on April 19, 2004, at p. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, provides: "[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

Title 21 of the United States Code, §848(q)(4)(B) provides: "In any post conviction proceeding under §2254 or 2255 of title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other service in accordance with paragraphs (5), (6), (7), (8), and (9)." Title 18 of the United States Code, §3006A Adequate representation of defendants, provides: "Whenever the United States magistrate [United States magistrate judge] or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who – (B) is seeking relief under section 2241, 2254, or 2255 of title 28."

STATEMENT

Petitioner, Charles Anthony Rifenbury, was indicted on November 25, 1997 for the offense of Indecency with a child, to wit: contact. (Clerk's Record pp. 2-3). On October 26, 1998, Petitioner pled not guilty. (Clerk's Record p. 69). On November 3, 1998 the Jury recommended fifteen years confinement in the Institutional Division of the Texas Department of Criminal Justice; Judge Wisch accepted the verdict and sentenced Petitioner to fifteen years in the Institutional Division of the Texas Department of Criminal Justice. (Clerk's Record pp. 79-80). Notice of Appeal was filed on November 6, 1998. (Clerk's Record p. 84). A duplicate signed by Mr. Warner was filed by mailing it on December 4, 1998. (Clerk's Record p. 90). On November 10, 1998 appeal bond was set at $25,000 with conditions of

appeal. (Clerk's Record p. 85). A timely Motion for New Trial was filed with the Trial Court's Clerk on December 4, 1997. (Clerk's Record p. 92). It was filed by mailing it on December 2, 1997. (Clerk's Record pp. 91, 93). The Motion for New Trial was overruled as a matter of law.

The Court of Appeals for the Second Court of Appeals District of Texas affirmed the judgment of conviction and sentence imposed. Its opinion was unpublished. *Rifenbury v. Dretke*, No. 2-98-549-CR, (Fort Worth July 20, 2000, pet. ref'd) (not designated for publication).

A timely Motion for Rehearing En Banc was filed on August 7, 2000. The Motion for Rehearing En Banc was overruled on August 25, 2000.

Upon timely Motion, the time to file a Petition for Discretionary Review was extended to October 25, 2000.

A Petition for Discretionary Review by the Court of Criminal Appeals of Texas was timely filed with the Clerk of the Court of Appeals for the Second Court of Appeals District of Texas.

The Petition for Discretionary Review was filed with the Court of Criminal Appeals on November 29, 2000. *Rifenbury v. State*, No. 1988-00, 2000 Tex.Crim.App. (Tex.Crim.App. Feb. 7, 2001, pet. ref'd). As the citation indicates, the Court of Criminal Appeals of Texas refused the Petition for Discretionary Review. *Rifenbury v. State*, No. 1988-00, 2000 Tex.Crim.App. (Tex.Crim.App. Feb. 7, 2001, pet. ref'd).

On February 7, 2002, Petitioner filed a state Application for Writ of Habeas Corpus, pursuant to Texas Code of Criminal Procedure Art. 11.07 (Affidavit of Mailing,

February 7, 2002, Ex Parte Rifenbury, No. 0669855D (372nd Dist.Ct., Tarrant County, Tex. Feb. 7, 2002)).

On August 14, 2002, the state Court of Criminal Appeals denied the state Application for Writ of Habeas Corpus. It mailed a postcard notice of that action, as indicated by its meter stamp, on August 16, 2002. Counsel received the notice on August 19, 2002.

On August 15, 2003, Charles Rifenbury filed a Petition for Writ of Habeas Corpus, cause U.S.D.C. # 4:03-CV-873-A, in the United States District Court for the Northern District of Texas, Fort Worth Division under 28 U.S.C. §2255. On September 8, 2003, the United States Magistrate Judge to whom the matter had been assigned filed findings of fact and recommendations, recommending summary dismissal as petition was filed beyond the one-year limitation period set forth in 28 U.S.C. §2244(d)(1). On September 26, 2003, the District Court signed a final judgment for summary dismissal and judgment was entered on September 29, 2003. On October 10, 2003, Petitioner moved to reconsider and motion was denied on October 17, 2003.

On October 27, 2003, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered September 29, 2003 denying his Petition for Writ of Habeas Corpus. The Notice of Appeal is taken as an Application for a Certificate of Appealability. The District Court on October 28, 2003, denied Petitioner's Application for Certificate of Appealability. The Fifth Circuit did also on April 19, 2004.

Following the court's denial of his writ of habeas corpus, due to untimely filing, Rifenbury's counsel made an admission of incompetence in Rifenbury's Application

for a Certificate of Appealability to the Fifth Circuit. Counsel admitted that he " . . . miscalendered the deadline for filing the Petition for Habeas Corpus pursuant to 28 U.S.C. 2254 . . . " *See* Certificate of Appealability, p. 8. Counsel further stated, "An attorney who miscalculates a dispository deadline is ineffective." *U.S. v. Guy*, 140 F.3d 735 (7th Cir. 1998). *See* Certificate of Appealability, pp. 8-9.

Rifenbury's counsel undoubtedly failed to read Title 28 U.S.C. §2254. Counsel's admission and explanation exhibit a lack of understanding of the statute that could only result from neglecting to even read it. Rifenbury's counsel's failure to file the Petitioner's writ timely was not a result of inexperience or exigent circumstances. It was the result of gross misconduct in not investigating simple procedural rules on behalf of his client in federal habeas proceedings.

REASONS FOR GRANTING THE WRIT

Charles Anthony Rifenbury filed a federal writ of habeas corpus presenting claims that his trial counsel had been ineffective. Since his federal habeas lawyer did not read the statute of limitations provision in 28 U.S.C. §2254, he filed the petition nine months late. In his Certificate of Appealability to the Fifth Circuit he admitted that he had been incompetent in so filing the writ.

Had Mr. Rifenbury been unable to hire counsel, his writ presented matters which, in the interest of justice, would have warranted appointment of counsel under 18 U.S.C. §3006A. Since the federal statute providing appointment of adequate counsel under these circumstances

provides for competent counsel, Mr. Rifenbury should be afforded no less fair a proceeding under the equal protection clause than people unable to hire adequate counsel.

This Court has recently expressed interest in ensuring that the process afforded to §2254 petitioners does not overburden them. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court reasoned that the Fifth Circuit Court of Appeals was acting as an appellate court without jurisdiction by requiring a petitioner to be successful on the merits of his §2254 claims before the petitioner would be afforded a right to appeal. The standard for meriting an appeal is not success on appeal. The standard for obtaining an appeal is that there are debatable issues that would encourage one to go forward. This Court sharply criticized the Fifth Circuit's "dismissive and strained interpretation of petitioner's evidence of disparate questioning," *id.* at 344, and concluded that the Fifth Circuit's requirements for granting a writ under 18 U.S.C. §2254 " . . . was too demanding a standard on more than one level." *Id.* at 341.

In *Banks v. Dretke* 124 S.Ct. 1256 (2004), this Court concluded that the defendant had been denied a fair trial as a result of misleading statements and suppression of evidence by the prosecution. Further, the petitioner had not been allowed to present a claim that he had only discovered the basis for his writ on a federal writ. "When the police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Id* at 1263. Thus, this Court refused to require a petitioner to "timely" discover matters about which he had been misled by the prosecution. The burden rests on

the prosecution to correct misrepresentations made to the court and petitioner.

In addition, this Court struck down a test requiring a defendant to establish a nexus between mitigating evidence and the offense before the mitigating evidence would be considered for materiality. This Court held that the standard imposed by the Fifth Circuit in refusing to allow the defendant to appeal the denial of his writ of habeas corpus, was " . . . an improper standard" that "has no basis in our precedents. . . ." *Tennard v. Dretke*, 124 S.Ct. 2562 (2004). In conclusion, this Court has expressed a keen interest in providing petitioners access to the courts and appropriate consideration and review of their claims.

The question presented is also important to the public as distinguished from its importance to the parties. It will convince society that justice is available and fair. A decision on this question will develop the law to reflect our increased concern with not only the appearance of justice but that actual justice be achieved as much as is practicable. States and the federal courts are struggling with a solution in cases where attorney incompetence forfeits the petitioner's ability to be heard. Oftentimes, capital murder cases number among those which do not receive merits review because the lawyer does not acquaint him or herself with the law and takes on a case that he or she is unqualified to handle. In a few of these cases the lawyer admits incompetence. *See generally A State of Denial: Texas Justice and the Death Penalty*, Texas Defender Service Report, Chapter Seven, pp. 105-106.

> "Of the 103 applications [for habeas corpus] reviewed for the study, 18 applications (17.5%) were 15 pages long or less, and 36 applications

(35%) were 30 pages or less. Eight applications were each under *ten* pages long[12] – an astonishing feat, as it is difficult to fit even the most rudimentary procedural matters into five pages. Habeas corpus applications filed by adequately funded, experienced counsel routinely run over 150 pages, because that amount of space is necessary to address both the factual issues in the case and the extraordinarily complex law applicable to habeas litigation.

One of the two shortest petitions-a mere three pages long-was filed on behalf of Robert Earl Carter on October 6, 1997.[13] The lawyer advised the court that he was relying on the arguments made in the direct appeal brief in the case, and further advised the court that both of his arguments had recently been 'rejected' by the CCA. The lawyer denied the need for an evidentiary hearing – a request so routine and essential to protecting the client's rights that even the most inexperienced habeas corpus attorneys usually file one.

The lawyer who filed Mr. Carter's habeas petition *did not even sign it*. Not only did the State decline to reply to the petition, the trial court did not issue fact findings denying it, even though both steps are clearly required by Article 11.071. The clerk transferred the appeal to the CCA on October 16, 1997 – ten days after the petition was filed. The CCA overlooked the fact that it did not even have a lower court decision to review, and denied Carter relief in a two-page order issued on November 19, 1997. The entire file of Robert Earl Carter's state habeas appeals is fewer than ten pages long. In federal court, Mr. Carter's new counsel tried to flesh out the minuscule three-page petition which had been filed

> on his behalf in state court. That task proved impossible, and Carter was executed on May 31, 2000.
>
> Ricky Kerr also had a three page habeas petition filed on his behalf. His lawyer later submitted a sworn affidavit admitting that filing such a brief and superficial appeal was a 'gross error in judgment.' The CCA also denied relief in his case.
>
> [12] *See* state habeas corpus applications filed on behalf of James Rexford Powell, Gustavo Julian Garcia, Johnny Joe Martinez, Ricky Eugene Kerr, Robert Earl Carter, Paul Richard Colella, Bryan Eric Wolfe, and Joe Lee Guy." *A State of Denial; Texas Justice and the Death Penalty*, Texas Defender Service Report, Chapter Seven, pp. 105-106.

Since federal statutory law provides the appointment of competent counsel in post-conviction in the interest of justice, and Charles Anthony Rifenbury's writ would have warranted such appointment of counsel had he been unable to afford to hire his admitted incompetent lawyer, his writ should not have been denied as untimely for his counsel's failure to read the habeas corpus statute. This Court has left open the question whether effective assistance of counsel may be required on a petitioner's first review of an ineffective assistance of counsel claim. *Coleman v. Thompson,* 501 U.S. 722, 755, 111 S.Ct. 2546 (2001). Thus this writ presents an important question of federal law that has not been, but should be, settled by this Court.

I. This Court should find that Title 18 U.S.C. §3006A providing appointment of adequate counsel to habeas litigants in the interest of justice establishes a right to adequate counsel post-conviction in limited circumstances.

A. Title 18 U.S.C. §3006A provides adequate counsel to persons unable to afford it in the interest of justice.

This Court has held that "neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right." *Coleman v. Thompson*, 501 U.S. 722, 756 (1991). However, legislatures can create more rights than granted by the U.S. Constitution. When a state chooses to add more rights "in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). For example, states that have granted the right to appeal convictions through actions of their legislatures must also comply with the equality demanded by the Fourteenth Amendment and provide the assistance of counsel. *Douglas v. California*, 372 U.S. 353, 358 (1963).

The federal legislature has also provided for more rights than those granted by the U.S. Constitution by enacting a variety of statues which provide for counsel in post-conviction proceedings and by doing so, "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness. . . . " *McFarland v. Scott,* 512 U.S. 849, 859 (1994).

Statutes that Congress has enacted "reflects a determination that quality legal representation is necessary . . . because '[t]he complexity of our jurisprudence in this area'. . . . " *McFarland v. Scott,* 512 U.S. 849, 855 (1994) citing *Murray v. Giarrantano,* 492 U.S. 1, 14 (1989). In particular, Congress has enacted statute 18 U.S.C. §3006A which provides that a court may appoint counsel when the court determines that the *interests of justice so require.* The "interests of justice" has been linked to a liberty interest. The U.S. District Court of New Hampshire has concluded that the legislative history of the statute "indicate[s] an intent to provide authority to appoint counsel in all cases which involve a deprivation of personal liberty." *Chamblin v. INS,* 176 F.Supp.2d 99, 103 (D.N.H. 2000). The concept that this statute, 18 U.S.C. §3006A, was based upon a fear of "deprivation of personal liberty" or a liberty interest was used by the New Hampshire court to apply the statute to non-criminal habeas proceedings involving the assignment of counsel INS detainees petitioning for writ of habeas corpus.

Title 18 U.S.C. §3006A specifically provides for the appointment of counsel in federal writs of habeas corpus contesting state court convictions. It provides that "Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who – . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28." The statute was enacted to provide counsel for persons who face a loss of liberty. H.R. REP. 91-1546, P.L. 91-447, Criminal Cases – Adequate Defense, House Report No. 91-1546, 1970 U.S. Code Cong. and Adm. News, p. 3982 at p. 3984, Sept. 30, 1970. The legislative history reflects that the purpose of the Criminal

Justice Act of 1964 was to provide adequate counsel for persons who did not have the financial ability to obtain adequate representation, not for persons who show that they are indigent. H.R. REP. 91-1546, P.L. 91-447, Criminal Cases – Adequate Defense, House Report No. 91-1546, 1970 U.S. Code Cong. and Adm. News, p. 3982 at p. 3984, Sept. 30, 1970. Thereafter, the Criminal Justice Act Revision of 1986 restructured 18 U.S.C. §3006A and changed the word defendant to person, noting that discretionary appointment of counsel was available for post-conviction writs.

> "Paragraph (a)(2) replaces current subsection (g) and lists those cases in which appointment of counsel is discretionary. . . . The word 'person' has been substituted for the word 'defendant' in this subsection, and elsewhere in the CJA, to reflect the fact that counsel may be appointed for habeas petitioners and material witnesses as well as for persons charged with a crime." H.R. REP. 99-417, P.l. 99-651, Criminal Justice Act Revision of 1986, House Report No. 99-417, 1986 U.S. Code Cong. and Adm. News, p. 6165 at pp. 6174-5, December 5, 1985.

The legislative history again noted the importance of competent counsel.

> "If counsel is not competent, the integrity of the justice system is jeopardized. Innocent defendants may be wrongly convicted, and defendants inadequately represented may have their cases retried or dismissed, regardless of their culpability. It is therefore critical that qualified attorneys be encouraged to represent financially eligible defendants, and that adequate compensation be

> set to insure that those attorneys who accept appointments do not suffer economic hardship. . . . All witnesses at the hearings urged the Subcommittee to update the Act so that defendants and certain other persons qualifying for the appointment of counsel could be assured of adequate representation, and so that qualified attorneys would continue to provide services." H.R. REP. 99-417, P.l. 99-651, Criminal Justice Act Revision of 1986, House Report No. 99-417, 1986 U.S. Code Cong. and Adm. News, p. 6165 at pp. 6166 and 6168, December 5, 1985.

A court may appoint counsel for any indigent person seeking 18 U.S.C. §2254 relief when the interests of justice so require. 18 U.S.C. §3006A. The court must decide whether the unrepresented litigant has presented a non-frivolous claim and then whether the nature of the litigation will make the appointment of counsel of benefit to the litigant and the court. "Several factors should influence the court's decision, including the pro se litigant's ability to investigate facts and present claims and the complexity of the factual and legal issues." *Battle v. Armontrout,* 902 F.2d 701, 702 (8th Cir. 1990) [court considered factors and concluded that the district court abused its discretion in failing to appoint counsel]. Morever, the Seventh Circuit has equated the appointment of counsel under 18 U.S.C. §3006A to be the appointment of "effective" counsel. *Rauter v. U.S.*, 871 F.2d 693, 695-97 (7th Cir. 1989). This is similar to the courts' interpretation of 21 U.S.C. §848(q)(4)(B). In both statutes, counsel will be provided to persons on post-conviction who are financially unable to obtain adequate representation. While 18 U.S.C. §3006A makes such appointment available only in the interest of justice, adequate representation is available in a non-capital case only under circumstances where the claims

raised deserve such counsel, in the interest of justice. *See also Ex Parte Graves,* 70 S.W.3d 103 (Tex. Crim. App. 2002) [dissent surveying states which provide habeas counsel require such counsel to be effective]. Texas' post-conviction statute provides for the appointment of "competent" counsel to death row inmates but held that counsel need only be competent at the time of appointment. *Ex Parte Graves,* 70 S.W.3d 103, 117 (Tex. Crim. App. 2002).

> "In *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), the Supreme Court reasoned that 'the promise . . . that a criminal defendant has a [federal constitutional] right to counsel on appeal . . . would be a futile gesture unless it comprehended the right to the effective assistance of counsel.' Relying on the logic of *Evitts,* the Supreme Court of Iowa concluded in 1985: 'We believe the statutory grant of a post-conviction applicant's right to court-appointed counsel [in postconviction proceedings arising out of prison disciplinary hearings] necessarily implied that that counsel be effective. . . . Nothing in our post conviction act indicates an intent on the part of the legislature that a different rule would apply. It would seem an empty gesture to provide counsel without any implied requirement of effectiveness.' *Patchette, v. State,* 374 N.W.2d 397, 398-9 (Iowa 1985).
>
> More recently, the Supreme Court of Iowa has applied the rationale of *Patchette* to the statutory grant of counsel for post-conviction proceedings attacking a conviction. *Dunbar v. State,* 515 N.W.2d 12, 14-15 (Iowa 1994). Similarly, the Supreme Court of Connecticut has reasoned that a statutory right to *habeas* counsel 'would become an empty shell if it did not embrace the right to have the assistance of a competent counsel.'

Lozada v. Warden, 223 Conn. 834, 613 A.2d 818, 821-2 (1992) (citing *Cullins v. Crouse,* 348 F.2d 887, 889 (10th Cir. 1965) & *United States v. Wren,* 682 F. Supp. 1237, 1241-42 (S.D. Ga. 1988)). In 1997, the Supreme Court of Connecticut reaffirmed its holding and rationale in *Lozada. Iovieno v. Commissioner of Correction,* 242 Conn. 689, 699 A.2d 1003, 1010 (1997). Earlier this year, the Supreme Court of South Dakota reached the same conclusion when it held that '[w]e will not presume that our legislature has mandated some useless formality requiring the mere physical presence of counsel as opposed to effective and competent counsel.' *Jackson v. Weber,* 623 N.W.2d 71, 74 (S.D. 2001) (internal quotation marks omitted) (citing *Lozada* and *Iovieno, supra*). Similarly, the Supreme Court of Pennsylvania has held that an indigent defendant has a statutory right to the appointment of counsel in a post-conviction proceeding: 'It is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel. . . . Indeed the right to counsel is meaningless if effective assistance is not guaranteed. Since appellant was entitled to representation by an attorney in his pursuit of his collateral attack, he was entitled to adequate representation of his claims at both the hearing and appellate levels.' *Com. v. Albert,* 522 Pa. 331, 561 A.2d 736, 738 (1989) (citing *Com. Ex rel. Washington v. Maroney,* 427 Pa. 599, 235 A.2d 349 (1967)). . . . The Supreme Court of Nevada has also reached this conclusion, albeit in *dicta*. In *McKague v. Whitley,* 112 Nev. 159, 912 P.2d 255, 257-8 (1996), the court held that because the petitioner had no statutory right to counsel in a post-conviction proceeding, he had no right to effective assistance of counsel in such a proceeding. In a footnote, the court noted

> that a recently enacted statute, which was not operative at the time that the petitioner in *McKague* was appointed post-conviction counsel, mandated appointment of counsel for a petitioner's first post-conviction proceeding. *Id.* at 258 n.5. Thus, the court concluded: 'As a matter of statutory interpretation, we note that where state law entitles one to the appointment of counsel to assist with an initial collateral attack after judgment and sentence, "it is axiomatic that the right to counsel includes the concomitant right to effective assistance of counsel." Thus, a petitioner may make an ineffectiveness of post-conviction counsel claim if that post-conviction counsel was appointed pursuant to [the recently – enacted statute]. *Id.* (Citing *Albert, supra).*'" *Ex parte Graves,* 70 S.W.2d 103, 126 (Tex. Crim. App. 2002) [Judge Johnson dissenting] [most footnotes omitted].

A court may appoint counsel for any indigent person seeking 18 U.S.C. §2254 relief when the interests of justice so require. 18 U.S.C. §3006A. The court must decide whether the pro se litigant has presented a non-frivolous claim and then whether the nature of the litigation will make the appointment of counsel of benefit to the litigant and the court. *See Johnson v. Williams,* 788 F.2d 1319, 1322 (8th Cir. 1986). "Several factors should influence the court's decision, including the pro se litigant's ability to investigate facts and present claims and the complexity of the factual and legal issues." *Battle v. Armontrout,* 902 F.2d 701, 702 (8th Cir. 1990).

Charles Rifenbury's habeas corpus petition raised ineffective counsel claims that would have required, in the interests of justice, appointment of counsel. In each claim, Rifenbury's ability to investigate is seriously impaired by

his incarceration and the factual and legal issues are sufficiently complex and numerous that appointment of counsel would benefit both Rifenbury and the court by allowing counsel to develop Rifenbury's arguments and focus the court's analysis. *See Battle v. Armontrout,* 902 F.2d 701 (8th Cir. 1990). Further, an indigent, incarcerated litigant is not in the position to investigate adequately. *Shields v. Jackson,* 570 F.2d 284, 286 (8th Cir. 1978).

Ground 1 raised the claim that trial counsel failed to investigate a matter which would have impeached the credibility of the two child witnesses; namely that both children had been told by the biological father that they were allowed to lie and the children did subsequently lie concerning whether the father had abused the stepmother. *Williams* was a similar case where the Seventh Circuit Court had determined that counsel was ineffective for not investigating a child witness's veracity to lie. *Williams v. Washington,* 59 F.3d 673 (7th Cir. 1995).

Ground 2 raised the claim that trial counsel also failed to investigate Petitioner's background and use the evidence that he had been abused by his father as mitigation of the punishment. *Wade v. Calderon*, 29 F.3d 1312, 1324-25 (9th Cir. 1994); *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995).

Grounds 3 and 4 relate to trial counsel's failure to exclude details of similar offenses at punishment where the details would have had a high probability of being excluded under Texas law. The prior similar convictions and deferred adjudication were highly prejudicial and the lack of any limiting instructions enabled the prosecutor to refer to the defendant's prior convictions. These claims

also represented the failure of the state to follow its own laws. *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1995).

These grounds would have required, in the interests of justice, appointment of counsel as analysis in determining whether the state followed its own laws in regard to presentation and consideration of prior offenses during sentencing as well as determining what factors can raise objections, when can mitigating factors be introduced, and the ability of the petitioner to conduct a valid investigation of any facts relating to the witnesses would raise to the level of, in the interests of justice, appointment of counsel.

B. This Court should find that where federal habeas presents the first opportunity for ineffective assistance of counsel claim to be heard, the petitioner does not bear the risk of his counsel's admitted incompetent acts.

This court held that a prisoner's failure to raise an ineffective assistance of counsel claim on direct appeal did not bar the claim from being brought in a subsequent proceeding for collateral review, regardless of whether the prisoner could have raised the claim on direct appeal. *Massaro v. United States*, 538 U.S. 500 (2003). It reasoned that collateral review presents the forum best suited to assess facts on ineffective assistance of counsel claims is in a post-conviction proceeding. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

Where such claims are presented in a writ of habeas corpus, the writ is similar to a direct appeal because the claims have not been presented to a court and reviewed. *Ex Parte Graves,* 70 S.W.3d 103, 123 (Tex. Crim. App.

2002) [Judges Price and Holcomb dissenting]. *See also Coleman v. Thompson,* 501 U.S. 722, 755, 111 S.Ct. 2546 (2001) [in case where notice of appeal filed three days late in state habeas question is left open whether an exception to whether one is entitled to post-conviction effective assistance of counsel exists where collateral review is the first place a petitioner can challenge his conviction]; *Daniels v. U.S.*, 532 U.S. 374, 387, 121 S.Ct. 578, 1586 (2001) [Scalia, concurring in case involving habeas challenge to prior convictions used to enhance a federal sentence] [citing *Coleman, supra*] ["Perhaps precepts of fundamental fairness inherent in 'due process' suggest that a forum to litigate challenges like petitioner's must be made available *somewhere* for the odd case in which the challenge could not have been brought earlier. . . . We have left open the question whether such [post-conviction] ineffective assistance of counsel can establish a constitutional violation].

Unlike *Coleman, supra,* Charles Rifenbury was not allowed a hearing on his ineffective assistance of counsel claim. Texas state habeas corpus proceedings are intended to review facts with regard to trial and make findings. The trial court's "hearing" allows both parties to put on testimony and for the court to evaluate the appearance and credibility of witnesses. However, in Rifenbury's case, affidavits were filed on behalf of both the prosecutor and the defendant. The Trial Court did not formulate its own findings from a thorough analysis of these affidavits and there were no depositions, interrogatories, or any evidentiary hearings. Rather, the Trial Court adopted the findings wholesale in the state's proposed findings of fact and conclusions of law. "The Court adopts the above State's Memorandum, Findings of Fact and Conclusions of Law as

its own and recommends that the relief Applicant requests should be DENIED." Order Entered May 3, 2002 in Ex Parte Charles Anthony Rifenbury, No. C-372-005821-0669855-A (372nd District Court, Tarrant County, Texas).

> "Each party proposes 'findings' which reflect its view of the disputed evidence. . . . At this point one would expect the trial court to synthesize its own 'findings of fact' from the evidence. A fair-minded observer might expect the court approach this task by selectively choosing from among the parties' proposed findings where appropriate, but primarily by drafting its own findings to reflect its own view of the evidence. Given the adversarial nature of our legal system, one would naturally expect the parties' proposed findings to represent diametrically opposed views of the facts. Given human experience, however, we would expect that the truth underlying any such complex dispute might well lie somewhere in the middle. Few Texas trial courts, however, write their own findings. Instead, they simply endorse the findings proposed .by the prosecutor, then forward the case to the Court of Criminal Appeals for its decision." *A State of Denial; Texas Justice and the Death Penalty*, Texas Defender Service Report, Chapter Eight, page 126.

This apparently happens in approximately 83.7% of the cases. *A State of Denial; Texas Justice and the Death Penalty*, Texas Defender Service Report, Chapter Eight, p. 127. Thus, in Rifenbury's case the Trial Court did not hear his ineffective assistance of counsel claims.

Since Rifenbury did not receive a meaningful review of his ineffective assistance of counsel claim on state

habeas, his federal writ presents the first opportunity for its review.

Where, as here, his counsel's confessed incompetence deprived him of that one meaningful review, and in these narrow circumstances only, the habeas petitioner should not bear the risk of his attorney's acts and his petition should be heard. He should have competent counsel for the purpose of securing his one meaningful review of his substantial ineffective assistance of counsel claim. This is because unheard ineffective assistance of counsel claims first presented in a writ of habeas corpus are similar to direct appeals, where one has the right to effective assistance of counsel.

CONCLUSION

Under very limited circumstances this Court should recognize the right to effective or competent counsel in a federal writ of habeas corpus for purposes of allowing one meaningful review of a petitioner's challenge to his conviction. The circumstances warranting such a right are the first review of a non-frivolous ineffective assistance of counsel claim which for a poor petitioner would justify appointment of counsel and the forfeiture of that review by

admittedly incompetent counsel. This Court should grant the petition for a writ of certiorari to decide this question.

Respectfully submitted,

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July 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11130
USDC No. 4:03-CV-873-A

CHARLES RIFENBURY,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Apr. 19, 2004)

ORDER:

Charles Rifenbury, Texas prisoner #1031791, moves for a certificate of appealability (COA) to appeal from the dismissal of his 28 U.S.C. § 2254 petition for writ of habeas corpus as time-barred pursuant to 28 U.S.C. § 2244(d). He contends that the limitations period should have been equitably tolled because of his long-standing relationship with retained counsel who was admittedly ineffective when he miscalculated the limitations period.

A COA may be issued only if the applicant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2). When a district court denies 28 U.S.C. § 2254 relief on procedural grounds without reaching the merits of the 28 U.S.C. § 2254 petition, this court should grant a COA only if the COA applicant can show that jurists of reason would find it debatable whether the petition has stated a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court's procedural ruling was correct. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Rifenbury has not shown that jurists of reason would find it debatable that the district court's procedural ruling was correct. His COA motion therefore is DENIED.

COA DENIED.

/s/ J. Smith
JERRY L. SMITH
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHARLES RIFENBURY, Petitioner, VS. DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION Respondent.	§ § § § § § § § § § §	NO. 4:03-CV-873-A

ORDER

(Filed Oct. 28, 2003)

The Fifth Circuit has determined that this court should rule on requests for certificates of appealability, *Muniz v. Johnson*, 114 F.3d 43 (5th Cir. 1997), and that a notice of appeal should be construed as a request for certificate of appealability. *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). The court is construing the notice of appeal filed by petitioner, Charles Rifenbury, as such a request and finds that same should be denied. For the reasons discussed in the court's order signed September 26, 2003, and in the September 8, 2003, findings, conclusions and recommendation of the United States Magistrate Judge, petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Accordingly,

The court ORDERS that petitioner's request for certificate of appealability be, and is hereby, denied.

SIGNED October 28, 2003.

/s/ John McBryde
JOHN McBRYDE
United States District Judge